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In the Supreme Court of the United States

OCTOBER TERM, 1961

NO. — 727

WASHINGTON STATE BOARD AGAINST DISCRIMINATION, and ROBERT L. JONES, *Petitioners,*

v.

JOHN J. O'MEARA, and DONNA A. O'MEARA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN J. O'CONNELL,
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STATE PRINTING PLANT, OLYMPIA, WASH

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of the State of Washington, entered in the above-entitled case on November 21, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court (Tr. 34) is unreported and is printed in Appendix B hereto, *infra* p. 65. The opinion of the State Supreme Court, printed in Appendix B hereto, *infra*, p. 32, is reported in 158 Wash. Dec. 791 and 365 P. (2d) 1.

JURISDICTION

The judgment of the State Supreme Court was entered on November 21, 1961; p. 84, *infra*. Rehearing was denied on November 21, 1961, p. 83, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., section 1257(3).

QUESTION PRESENTED

Whether a state statute prohibiting discrimination based on race or national origin in publicly assisted housing contravenes the equal protection clause of the Fourteenth Amendment to the United States Constitution by unreasonably discriminating against owners of publicly-assisted housing in favor of owners of non-publicly-assisted housing.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is the 1957 amendment to the Washington Law Against Discrimination, Chapter 37, sections 3 and 4, p. 108, RCW 49.60.030, printed in Appendix A, *infra*, pp. 29-31. The constitutional provisions involved are the United States Constitution, Amendment 14, and The Washington State Constitution, Article I, section 12, printed in Appendix A, *infra*, p. 31.

STATEMENT

In April, 1959, respondent John O'Meara, a white owner of a single-family residence in Seattle, Washington, was a Commander in the United States Coast Guard. His home, purchased in 1955, was

financed through a private loan insured by the Federal Housing Administration (FHA). Having received transfer orders to Washington, D. C., he placed his home for sale by running an advertisement in the Seattle Times newspaper and by posting a "For Sale" sign on his lawn. The advertised price of his house was $18,000.00. Seeking to deal directly with prospective purchasers, he did not list his home for sale with a real estate broker.

Robert L. Jones is a Negro, an employee of the United States Post Office, and a resident of Seattle, Washington. On Friday, April 17, he read the classified advertisement section in the Seattle Times and found Commander O'Meara's home listed therein for sale. After inspecting the O'Meara home, Mr. Jones sought to purchase it at Commander O'Meara's asking price of $18,000.00; but the O'Mearas refused to sell the house to him because of his color.

On April 22, Mr. Jones filed a complaint with the Washington State Board Against Discrimination (hereinafter referred to as the Board). As authorized by statute, the Board convened a hearing which was held April 25. The hearing consumed approximately eleven hours and the transcript of testimony ran to 300 pages. Seven witnesses were heard. The hearing tribunal found as a fact that the O'Mearas had refused to sell their home to Mr. Jones because of his color and concluded that such refusal constituted an unfair practice as defined in the Washington Law Against Discrimination, which makes

it an unfair practice for "the owner of publicly assisted housing to refuse to sell, rent or lease to any person * * * because of race, creed, color or national origin. * * *" RCW 49.60.217. An investigating officer had found that no agreement could be made with the O'Mearas for the elimination of that practice. The administrative tribunal ordered the O'Mearas to cease and desist said practice and further ordered them to accept complainant's offer and tender of earnest money (Tr. 57).

On May 13, 1959, Commander O'Meara petitioned the Superior Court for review of the administrative order (Tr. 74). The Federal constitutional issue involved herein was drawn in question by respondent's complaint filed in that court. On June 26, 1959, an order was entered allowing the complainant Robert L. Jones to intervene (Tr. 68). After a three-day trial, the Superior Court rendered a memorandum opinion holding the administrative order null and void on the ground that it was based on a statute violative of the Federal and State Constitutions (Tr. 34). The trial judge assumed that the hearing tribunal was correct in finding that the O'Mearas had refused to sell their home to Mr. Jones because of his color. An order dismissing the proceedings was entered on October 14, 1959 (Tr. 70). On October 30, 1959, timely notice of appeal to the Washington State Supreme Court was duly filed and served (Tr. 51). The Federal constitutional issue involved herein was drawn in question in the

Washington Supreme Court by Petitioner's (then appellant) assignments of error in that court. The Washington State Supreme Court, on September 29, 1961, affirmed the judgment of the trial court holding that the statute upon which the administrative order was based was unconstitutionally discriminatory under the equal protection clause of the Fourteenth Amendment to the Federal Constitution and the privileges and immunities clause of Article I, section 12 of the Washington State Constitution. Four Judges dissented.

The rationale of the State Supreme Court was that the application of the law only to "publicly assisted" property constitutes an unreasonable classification. In this regard, the Court relied only upon one case: *Patsone v. Pennsylvania*, 232 U. S. 138 (1914), decided by this Court. A petition for rehearing was denied on November 21, 1961.

The Statute in Question

The prohibition of discrimination in publicly assisted housing was written into the law of Washington in 1957. *Laws of 1957*, Chapter 37 (RCW 49.60).

> "The right to be free from discrimination because of race, creed, color or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> "* * * (3) The right to secure publicly assisted housing without discrimination." *Laws of 1957*, Chapter 37 § 3, RCW 49.60.030.
>
> "Publicly-assisted housing includes any

building * * * which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof." *Laws of 1957*, Chapter 37 § 4, RCW 49.60.040.

The law lists a number of practices as unfair practices with respect to publicly assisted housing. One such practice is for the owner of publicly assisted housing to refuse to sell, rent or lease such housing to any person because of his race, creed, color or national origin. (RCW 49.60.217.) Power to enforce this ban is vested in the Washington State Board Against Discrimination (RCW 49.60.050, 49-.60.120, 49.60.140, 49.60.150, 49.60.240, 49.60.250, 49.60.260). The Board is authorized to receive, in-

vestigate and pass upon complaints of unfair practices. If the Board finds, after an investigation notice and a hearing, that a person has engaged in an unfair practice as defined in the law, it may issue a cease-and-desist order which may be enforced through the courts. (RCW 49.60.260, 49.60.270, 49-.60.280, 49.60.290.)

REASONS FOR GRANTING THE WRIT

We have here a Federal question of substance not yet determined by this Court; namely, whether the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits a state from enacting an anti-discrimination law applicable to publicly assisted housing. We are mindful of the long-standing rule that when the decision of a State Court is based upon alternative grounds, one Federal and the other, non-Federal, this Court will not review a decision which may be supported by an adequate and independent non-Federal ground. Qualifying that doctrine, however, is the rule that where the non-Federal ground is so interwoven with the other as not to be an independent matter, this Court has jurisdiction. *Minnesota v. National Tea Company*, 309 U. S. 551; *State Tax Commission v. Van Cott*, 306 U. S. 511.

UNDER WASHINGTON LAW, THE CONSTRUCTION OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE I, SECTION 12 OF THE STATE CONSTITUTION IS CONTROLLED BY THIS COURT'S CONSTRUCTION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In this case, the Washington Supreme Court, in relying upon both the equal protection clause of the United States Constitution and the privileges and immunities clause of the State Constitution necessarily decided a Federal question, inasmuch as the Washington Supreme Court has consistently held that the two clauses, although differently worded, are substantially identical. A number of Washington cases expressly hold that, in interpreting the privileges and immunities clause of the State Constitution, this Court's decisions construing the equal protection clause of the Fourteenth Amendment are controlling. *In re Olsen v. Delmore*, 48 Wn. (2d) 545, 295 P. (2d) 324; *Texas v. Cohn*, 8 Wn. (2d) 360, 112 P. (2d) 522; *State v. Hart*, 125 Wash. 520, 217 Pac. 45; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918.

In *Texas v. Cohn*, 8 Wn. (2d) 360, the Washington Supreme Court considered the constitutional validity of an excise tax on fuel oil producers. It was contended that the statute was violative of both the equal protection clause of the Fourteenth Amendment and the privileges and immunities clause of Article I, section 12 of the State Constitution. The Washington Supreme Court first dealt with what

it characterized as the "Federal phase of the case." It reviewed a number of decisions of this Court construing the equal protection clause: namely, *Brown-Forman Company v. Kentucky*, 217 U. S. 563; *Tax Commissioners v. Jackson*, 283 U. S. 527; *Puget Sound Power and Light Company v. Seattle*, 291 U. S. 619; *Heisler v. Thomas Colliery Company*, 260 U. S. 245. On the basis of this Court's construction of the equal protection clause of the Fourteenth Amendment, the excise tax was sustained.

The Washington Supreme Court next considered the validity of the excise tax statute under the privileges and immunities clause, Article I, section 12, of the State Constitution and held:

> "On that question, the decisions of the United States Supreme Court which we have cited are applicable, since *this Court regards the equal privileges and immunities provision of Article I, section 12 of the State Constitution and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as substantially identical.*"

Each of the following cases: *Allen v. Billingham*, 95 Wash. 12, 163 Pac. 18; *Supply Laundry Company v. Jenner*, 178 Wash. 72, 34 P. (2d) 363; and the *Inland* case, without specific comment, tacitly recognizes the substantial identity of the State and Federal constitutional provisions in question *by indiscriminately discussing and disposing of them as one.*" (Emphasis added.) 8 Wash. (2d) at 374.

In *State v. Hart*, 125 Wash. 520, 217 Pac. 45, the Washington Supreme Court said:

> "We have not deemed it necessary to discuss separately appellant's claims of right under the State [privileges and immunities clause] and Federal Constitutions [equal protection clause] being of the opinion that *the reason and the result to be reached would necessarily be the same in view of the manifest identity and substance.*" (Emphasis added.) 125 Wash. at 525.

In *In re Olsen v. Delmore*, 48 Wn. (2d) 545, 295 P. (2d) 324, the Washington Supreme Court held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment and the privileges and immunities clause of Article I, section 12 of the State Constitution a statute which effectively authorized prosecuting officials to charge a violation of the uniform firearms act either as a gross misdemeanor or a felony, reasoning that a statute prescribing different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations is violative of the Fourteenth Amendment to the United States Constitution. The Washington Supreme Court held that "such a statute must, *therefore*, be violative of Article I, section 12 of the Constitution of the State, relating to privileges and immunities, since this provision of the State Constitution is substantially identical with the equal protection clause of the Fourteenth Amendment." (Emphasis added.) 48 Wn. (2d) at 550.

Thus, under Washington law, a construction of the privileges and immunities clause of the State Constitution is necessarily a construction of the equal protection clause of the Fourteenth Amendment. And so it is in this case. The majority opinion below concludes that the statute in question "not only violates the equal protection clause of the Fourteenth Amendment to the United States Constitution but violates the special privileges and immunities clause of Article I, section 12 of the Washington State Constitution." 158 Wash. Dec. at 797, 365 P. (2d) at 4. The only case relied upon by the Washington Supreme Court in holding that the statute makes an unreasonable classification in its application solely to publicly assisted property was this Court's decision in *Patsone v. Pennsylvania*, 232 U. S. 138. The trial court's reliance upon Federal constitutional law was even more conspicuous. It was said in the trial court's memorandum opinion that "the State here, in order to prevail, must demonstrate that the complainant Jones lies within the ambit of the equal protection clause of the Fourteenth Amendment to the United States Constitution, which is 'an explicit safeguard of prohibited unfairness.' *Bolling v. Sharpe*, 347 U. S. 497." Also relied upon by the trial court was this Court's decision in *Shelley v. Kramer*, 334 U. S. 1. The *Kraemer* case was used to illustrate "a distinction between state and private action." *Nebbia v. New York*, 291 U. S. 502 and *United States v. Carolene Products Company*, 304 U. S. 144, decisions of this Court, were

cited to sustain the proposition that "a law must not be unreasonable, arbitrary, or capricious and that the means selected to accomplish the desired result shall have a real and substantial relation to the object sought to be attained." We mention this review of the Federal cases by the trial court for the reason that the Washington Supreme Court, in affirming the judgment of that court, largely adopted the trial court's decision as its own. Neither the Washington Supreme Court nor the Superior Court relied upon a Washington case in holding the State Legislature's classification unconstitutionally unreasonable, presumably for the reason that to do so would have been mere surplusage. See *State v. Hart*, 125 Wash. 520, 525, 217 P. 45.

State Incorporation by Reference of Federal Law

Where a decision under state law necessarily involves the construction or validity of Federal law, the determination of such Federal law in the application of state law gives rise to a Federal question for review in this Court. *Standard Oil Company of California v. Johnson*, 316 U. S. 481; *Minnesota v. National Tea Company*, 309 U. S. 551; *State Tax Commission v. Van Cott*, 306 U. S. 511; *Smith v. Kansas City Title & Trust Company*, 255 U. S. 180. "[This Court] cannot be content with dismissal of the petition where there is strong indication * * * that the Federal Constitution as judicially construed controlled the decision below." *Minnesota v. National Tea Company*, 309 U. S. 551, 556.

In *State Tax Commission v. Van Cott*, 306 U. S. 511, the Utah Supreme Court had held that Federal employees' salaries were exempt from state taxation because of this Court's decision in *Graves v. O'Keefe*, 306 U. S. 466. It was urged by the respondent in that case that the Utah Supreme Court's decision "was based squarely upon a construction of the Utah taxing statute which was held to omit respondent's salaries as a subject of taxation, and therefore that decision did not and could not reach the Federal question and should not be reviewed." 306 U. S. at 513. In answering that contention, this Court said:

> "But that decision cannot be said to rest *squarely* upon a construction of the State statute. The Utah Court stated that the question before it was whether respondent's salaries from the agencies in question were 'taxable income for the purpose of the State income tax law,' and that the answer depended upon whether these agencies exercised 'essential governmental functions.' But the opinion as a whole was that the Court felt constrained to conclude as it did because of the Federal Constitution and this Court's prior adjudications of constitutional immunity. If the Court were only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemptions to respondent this Court would have no jurisdiction to review that question. *But, if the State Court did in fact intend alternatively to base*

its decision upon the State statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law." 306 U. S. at 514. (Emphasis added.)

The judgment of the Utah Supreme Court was vacated and remanded to the Utah Supreme Court for clarification. And see, to the same effect, *State Tax Commission of Arizona v. Murray Company of Texas*, 364 U. S. 289, granting *certiorari* and summarily vacating and remanding for clarification the judgment of the Supreme Court of Arizona, 87 Ariz. 268, 350 P. (2d) 674, on the authority of *Minnesota v. National Tea Company, supra.*

In *Moorhead v. Tipaldo*, 298 U. S. 587, the New York Court of Appeals had relied upon the due process clauses of its own constitution and of the United States Constitution, both deemed to be the "same in this particular," 270 N. Y. 233, in holding unconstitutional a state minimum wage law. This Court, nonetheless, granted *certiorari* and decided the case on the merits.

In *Missouri v. Mayfield*, 340 U. S. 1, and *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437, although it was uncertain whether or not the decisions of the respective State supreme courts rested on an adequate state ground, this Court nonetheless decided the Federal question before remanding to the lower court for clarification. Without

abandoning in the slightest degree our principal contention that here *certiorari* be granted and that this case be heard on the merits, we note the disposition of the *Mayfield* and *Perkins* cases, *supra*, as a possible alternative to a denial of *certiorari*.

THE QUESTION INVOLVED HEREIN IS OF BROAD NATIONAL IMPORTANCE INASMUCH AS AT LEAST TWELVE OTHER STATES HAVE ENACTED ANTI-DISCRIMINATION HOUSING LAWS AND OTHER STATES MAY BE INCLINED TO DO SO.

The "ghetto" and how best to eliminate it is largely a "big city" problem, one not at all confined to a single area of the United States. Its degree of acuteness and the complexities inherent in its solution vary from locale to locale. It is a local problem *best* solved at the local level by the citizens of the respective states acting through their legislative bodies. We are not so naive as to suggest that *all* of the evils flowing from and caused by the ghetto are directly or indirectly attributable to segregated housing. But the state is not bound "to strike at all evils at the same time or in the same way." *Semler v. Oregon Dental Examiners*, 294 U. S. 608, 610. There is no constitutional requirement that a regu-

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For general discussion of the "independent state ground" doctrine see, Notes, 74 Harv. L. Rev. 1375, 1380; 49 Yale L. J. 1463, 95 U. Pa. L. Rev. 764, 771; 40 Mich. L. Rev. 84.

Colo. Laws 1959, ch. 148; Conn. Gen. Stat. § 53-35 (1958); Ill. Rev. Stat. ch. 32 § 550 3-4 (1957); Ind. Ann. Stat. § 48-8503 (b) (1953); Mass. Gen. Laws Ann. ch. 151B, § 1(10) (Supp. 1958); Mich. Stat. Ann. § 28.343 (Supp. 1957); N. J. Stat. Ann. § 55:14A-39.1 (Supp. 1958); N. Y. Pub. Housing Law § 223; Ore. Rev. Stat. § 659.032 (1957); Pa. Stat. Ann. Tit. 35, §§ 1590.12, 1711 (a) (1), (8), (1950); Tit. 35, § 1664 (Supp. 1958); R. I. Gen. Laws Ann. § 11-24-4 (1956); Wis. Stat. §§ 66.39 (13), 66.40 (2m), 66.43 (2m).

lation must reach every class to which it might be applied. *Salsburg v. Maryland*, 346 U. S. 545; *Silver v. Silver*, 280 U. S. 117; *Miller v. Wilson*, 236 U. S. 373. Mr. Justice Holmes, speaking for this Court, put the matter succinctly when he said in answer to a "classification" argument:

> "The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." *Buck v. Bell*, 274 U. S. 200, 208.

In considering the validity of a classification as matched against the prohibitions of the Fourteenth Amendment, the test is one of reasonableness: the test is whether this Court can say "*a priori* that the classification is one forbidden as without basis and arbitrary." *Silver v. Silver*, 280 U. S. 117, 123.

THE "PUBLICLY ASSISTED" CLASSIFICATION USED BY THE WASHINGTON LEGISLATURE WAS NEITHER ARBITRARY NOR UNREASONABLE.

First, that the classification used by the Washington Legislature was neither arbitrary nor unreasonable is indicated by the underlying rationale of this Court's decisions in the "segregation cases," holding unconstitutional statutes, ordinances, and practices imposing segregation in establishments supported directly or indirectly by public funds. The cases are legion, and we make but passing reference to some of them: *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S.

631; *Sweatt v. Painter*, 339 U. S. 637; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (*public* universities); *Brown v. Board of Education*, 347 U. S. 483; *Bolling v. Sharpe*, 347 U. S. 497 (*public* schools); *New Orleans City Park Improvement Association v. Detiege*, 358 U. S. 54, summarily affirming same case below, 252 F. (2d) 122 (5th Cir.), *Mayor and City Council of Baltimore City v. Dawson*, 350 U. S. 877, affirming same case below, 220 F. (2d) 386; *Holmes v. City of Atlanta*, 350 U. S. 879 (*public* parks); *Sweeney v. Louisville*, 347 U. S. 971, reversing *per curiam*, *Muir v. Louisville Park Theatrical Association*, 202 F. (2d) 275 (6th Cir.) (theatre leased from *public* body); *Pennsylvania v. Board of Trusts*, 353 U. S. 230 (private school operated by *public* board of trustees); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (restaurant which was physically and financially an integral part of a *public* building). If this Court adopted the reasoning of the Washington State Supreme court in holding the "publicly assisted" classification unreasonable and void, the effect would be to undermine the spirit if not the rule of the above cases. But we need not take our argument that far. We are not asking this Court to determine whether, in the absence of a statute, discrimination in publicly assisted housing would be unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment. We are here dealing with a legislative enactment. The Fourteenth Amendment does not prohibit legislation which pro-

hibits discrimination on the basis of race in the use of facilities serving a public function. Such legislation "is within the police power of the states." *District of Columbia v. John R. Thompson Company*, 346 U. S. 100; See *Railway Mail Association v. Corsi*, 326 U. S. 88, 93, 94; *Bo Lo Excursion Company v. Michigan*, 333 U. S. 28, 34. See Forster & Rabkin, The Constitutionality of Laws Against Discrimination In Publicly Assisted Housing, 6 N. Y. Law Forum 38 (1960).

Second, the means used by the Washington Legislature to combat the evils of the ghetto has a reasonable connection with the end sought to be achieved. For the past twenty-five years, the Federal Government has played a major role in the housing industry. The Public Housing Administration (PHA) administers the public rent and housing program by providing development loans and annual subsidies to local communities for developing and operating projects for low-income families. Today, there are more than 2,000 federally aided projects with 451,000 units managed by 1,000 local authorities housing almost 2,000,000 people in 42 states. United States Commission on Civil Rights, *With Liberty and Justice for All*, pp. 172-73 (1959).[3] (Hereinafter referred to as Commission Report.) Urban Renewal Administration (URA) authorizes advances to local communities for planning housing projects, giving loans and grants up to two-thirds

[3] This is a summary of the full report of the United States Commission on Civil Rights issued September 9, 1959.

of the cost of purchasing and clearing land for rehabilitation of blighted urban areas. These projects are carried out by local public agencies under powers granted by state and local enabling laws. In 1960, 877 localities had adopted workable programs, and 645 projects were being carried out in 386 localities. The Federal Government had provided 1.3 billion dollars for these projects. Commission Report, *supra* at pp. 173-75. The Federal Housing Authority and the Veterans Administration administer the Federal Home Mortgage Loan Insurance programs. Since 1935, FHA has written mortgage insurance on more than five million homes and on multi-family rental and co-operative housing units of 800,000 families. Commission Report, *supra* at pp. 171-72. See, McGhee and Ginger, *The House I Live In*, A Study of Housing for Minorities, 46 Corn. L. Q. 194. In the State of Washington, 79,470 single family dwellings had outstanding mortgages insured by FHA funds when the legislature in 1957 amended the anti-discrimination law to include publicly assisted housing. In King County alone, where the vast majority of minority groups reside, 36,830 single family dwellings had outstanding mortgages insured by FHA funds. Also, in the State of Washington at that time, 111 apartment buildings containing 7,316 units and in King County, 64 apartment buildings containing 3,479 units benefited from FHA backed loans.[1] The United States Commission on Civil Rights has noted that:

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[1] Federal Housing Administration, Division of Research and Statistics, Statistics Section, Washington, D. C.

"[N]onwhite home buyers and renters have not enjoyed the benefits of FHA mortgage insurance to the same extent as whites. According to testimony before this Commission, fewer than 2 per cent of the total number of new homes insured by FHA since 1946 have been available to minorities, and most of these homes have been in all-Negro developments in the South.

" 'Although the lower participation of nonwhites has in part been due to their lower incomes, FHA itself bears some responsibility. Until the Supreme Court ruled in 1948 that official enforcement of racially restrictive covenants was unconstitutional, FHA actually encouraged the use of such covenants.

"This is no longer the case, but FHA continues to insure mortgages on housing developments where the builder announces his intention to exclude Negroes, even where this is contrary to state or city laws against discrimination. FHA assistance has played an important part in the development of all-white suburbs around most large cities." Commission Report, *supra* at pp. 171-72.

It is fundamentally unfair to deny to a taxpayer whose money is used for these vast housing programs an opportunity equal to that of his fellow citizens to take advantage of them. It is also apparent from the figures indicating the large number of publicly financed homes in the United States and particularly in the State of Washington that the prohibitions of Washington's Law Against Discrimination necessarily reach a broad segment of the community.

That segregated housing is an evil is clear beyond doubt. Indeed, both the Court below and the trial court concede so much. In that regard, the Washington Supreme Court, adopting verbatim the trial court's language, said:

> "This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with substandard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to instability in family life, moral laxity, and delinquency. It can and must be eliminated, not only in order that the members of our minority groups may reach their full potential but also in order that the majority may be brought to act in a manner consistent with the principles which they profess. It may be noted also that elimination of discrimination is necessary for the sake of America's relations with the rest of the world. Our standing with the so-called uncommitted peoples of the world suffers seriously because of the continued discrimination and segregation practiced in America." *O'Meara v. Washington State Board Against Discrimination*, 158 Wash. Dec. at 793, 365 P. (2d) at 3.

Finally, the United States Commission on Civil Rights had this to say about the general problem:

> "Most of these Americans, regardless of their educational, economic, or professional accomplishments, have no alternative but to live in used dwellings originally occupied by white Americans who have a free choice of housing, new or old. Housing thus seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay. * * * The results can be seen in high rates of disease, fire, juvenile delinquency, crime and social demoralization among those forced to live in such conditions. A nation dedicated to respect for the human dignity of every individual should not permit such conditions to continue." Commission Report, *supra* at p. 180.

CONCLUSION

The people of the State of Washington, acting through their State Legislature, have sought to eliminate from the publicly assisted housing program one of the race problem's insidious roots: segregated housing. The Washington State Supreme Court holds that the Federal Constitution precludes this. That Court palpably erred, we submit. This Court should welcome the opportunity to effectively announce that states now or prospectively inclined to enact anti-discrimination laws applicable to publicly assisted housing are not so prohibited by the United States Constitution.

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfuily submitted.

JOHN J. O'CONNELL,
Attorney General,

HERBERT H. FULLER,
Deputy Attorney General,

Attorneys for Petitioner.

Appendix A

STATUTE AND CONSTITUTIONS

Amendment to

WASHINGTON LAW AGAINST DISCRIMINATION

Chap. 37, Laws of 1957

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 1, chapter 183, Laws of 1949 and RCW 49.60.010 are each amended to read as follows:

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers, with respect to elimination and prevention of discrimination in employment, in places of public resort, accommodation or amusement, and in publicly-assisted housing because of race, creed, color, or national origin; and the

board established hereunder is hereby given general jurisdiction and power for such purposes.

SECTION 3. Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(3) The right to secure publicly-assisted housing without discrimination.

"Publicly-assisted housing" includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal gov-

ernment or any agency thereof, or the state or any of its political subdivisions, or any agency thereof:

SECTION 15. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

It shall be an unfair practice:

(1) For the owner of public-assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons:

Amendment 14, U. S. Constitution

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 12, Washington State Constitution

No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Appendix B

OPINIONS AND JUDGMENTS BELOW

In The Supreme Court of The State of Washington

JOHN J. O'MEARA *et al.*, *Respondents*, v. THE WASHINGTON STATE BOARD AGAINST DISCRIMINATION, *Appellant*, RAYMOND D. TORBENSON *et al.*, *Defendants*, ROBERT L. JONES, *Intervenor.*

Appeal from a judgment of the Superior Court for King County, No. 535996, James W. Hodson, J., entered October 14, 1959, vacating an order of the State Board Against Discrimination. Affirmed.

The Attorney General, Philip R. Meade, Wing Luke, and *Elihu Hurwitz, Assistants*, for appellant.

George J. Toulouse, Jr. (*Richard M. Thatcher*, of counsel), for respondents.

Robert W. Winsor, Howard P. Pruzan, and *Marvin B. Durning*, for intervenor.

Benjamin S. Axia, Philip L. Burton, Sam L. Levinson, Solie M. Ringold, Toru Sakahara, Leonard W. Schroeter, Charles Z. Smith, David J. Smith, Fredric C. Tausend, Garvin, Ashley & Foster, Paul P. Ashley, Wilbur J. Lawrence, and *Byron D. Coney*, *amici curiae.*

FOSTER, J.—This is an appeal by the Washington State Board Against Discrimination from a final judgment holding null and void an order of the appellant requiring John J. O'Meara and his wife to sell their home to the intervenor, Robert L. Jones, who is a Negro.

The constitutionality of the 1957 amendment to the law against discrimination is presented. Laws of 1957, chapter 37, § 3, p. 108, RCW 49.60.030, declares freedom from discrimination on account of race, creed or national origin to be a civil right and that it shall include the right to secure publicly-assisted housing without discrimination. The text of the statute is:

> "The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> "(3) The right to secure publicly-assisted housing without discrimination."

By the express terms of the 1957 amendment, the power of the appellant board to order a sale is limited to those owners offering their homes for sale while a loan from a Federal or state agency remains unpaid or while there is a commitment for such a loan. The statute gives the board no power to require an owner to sell to any particular person under any other circumstances. That is to say, as soon as such a loan is paid, the board's power in the premises is at an end.

The statute is:

> "'Publicly-assisted housing' includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance

of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, *provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of such loan and such guarantee or insurance; or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof;*" Laws of 1957, chapter 37, § 4, p. 109, 111. (Italics ours.)

The trial judge favored this court with a painstaking written opinion in which the facts are fairly stated as follows:

> "The petitioner John J. O'Meara is a Commander in the United States Coast Guard. He and his wife own a single-family residence at 3004 East 70th Street, Seattle, Washington. In the early spring of this year, Commander O'Meara received orders transferring him to Washington, D. C. He placed his Seattle home on the market by running an advertisement in the Seattle Times and by posting 'For Sale' signs on his front lawn and at other places in the neighborhood. He did not list it for sale with any real estate broker as he intended to deal directly with prospective purchasers.

"The complainant, Robert L. Jones, is a Negro, employed by the United States Postal Service. On Sunday, April 19th, Mr. and Mrs. Jones and some friends visited and inspected the O'Meara home. On Tuesday, April 21st, complainant's attorney went to the O'Meara home and left with Mrs. O'Meara a signed earnest money receipt contemplating a sale for $18,000, 'all cash to seller on closing.' The earnest money receipt was accompanied by a check for $1,000 as a down payment. These documents were left with Mrs. O'Meara over her protest. On April 22, they were returned to complainant's attorney by Commander O'Meara.

"Mr. Jones lodged a complaint with the Washington State Board Against Discrimination, which followed the statutory administrative procedure by convening a hearing tribunal, which sat on Saturday, April 25th. The hearing consumed approximately eleven hours and the transcript of the testimony runs to 300 pages. Seven witnesses were heard. Thereafter, the hearing tribunal filed its opinion, findings of fact, and order. The hearing tribunal found, as a fact, that the O'Mearas had refused to sell their home to complainant because of his color, and that such refusal constituted an unfair practice as defined in RCW 49.60.217.

"The home in question is approximately 24 years old. The O'Mearas bought it in 1955. It was financed through a private loan insured by the Federal Housing Administration, which hereafter in this opinion will be referred to as FHA. The law against discrimination under

the authority of which the hearing tribunal sat, insofar as it applies to housing, was not enacted until 1957.

"For the purposes of this opinion, it will be assumed that the hearing tribunal was correct in finding that the O'Mearas had refused to sell their home to complainant because of his color. * * *"

Judge Hodson admirably stated the evils of housing discrimination in the following paragraph:

"This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with substandard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to instability in family life, moral laxity, and delinquency. It can and must be eliminated, not only in order that the members of our minority groups may reach their full potential but also in order that the majority may be brought to act in a manner consistent with the principles which they profess. It may be noted also that elimination of discrimination is necessary for the sake of America's relations with the rest of the world. Our standing with the so-called uncommitted peoples of the world

suffers seriously because of the continued discrimination and segregation practiced in America."

The trial court reviewed the two other decided cases presenting related problems as follows:

> "*New York State Commission Against Discrimination vs. Pelham Hall Apartments, Inc., et al.*, [10 Misc. (2d) 334, 170 N. Y. S. (2d) 750 (1958),] is Index No. 8642 1957 in the Supreme Court of the State of New York for Westchester County. The Commission Against Discrimination had ordered the respondents not to discriminate in the leasing of apartments in alleged publicly-assisted housing. The respondents were the owners of a multiple-apartment dwelling. They refused to lease an apartment to one Shervington, a Negro. They admitted that their refusal was because of his race. The FHA commitment had been made on June 30, 1955, and the effective date of the New York statute was the following day, July 1st. It is to be noted that the New York statute is prospective only. It does not, as the Washington statute purports to do, apply to housing which was publicly assisted before its effective date. The bank advances which were made on account of the insured loan during construction of the project all came subsequent to the effective date of the act. It is to be noted also that the New York statute applies only to multiple dwellings or housing projects of ten or more contiguous houses. In the circumstances, the court had no difficulty in finding the respondents' property to be publicly assisted. On the constitutional ques-

tion, the court recognized that the legislation could be justified only if it was determined that it was a valid exercise of the public power. It was held that the act was a valid exercise of the police power, and that its limitation to the specified classes of housing and to housing which became publicly assisted after July 1st, 1955, was a reasonable classification or at least was not so arbitrary and unreasonable as to be in violation of the equal-protection clauses. Accordingly, the application of the Commission to enforce its order against the respondents was granted.

" * * *

"*Levitt & Sons, Inc., vs. Division Against Discrimination* is No. A-334-58 in the Appellate Division of the Superior Court of New Jersey, decided July 22, 1959 [since affirmed by the supreme court of New Jersey, 31 N. J. 514, 158 A. (2d) 177]. In that case, the plaintiff appellant was the developer of approximately 16,000 one-family houses in a project known as Levittown. Its coplaintiff, Greenfield's Farm, Inc., was the developer of approximately 600 houses in Greenfield's Village. The FHA had committed itself to insure mortgages made by purchasers. It was necessary for FHA to approve the site and to lay down requirements concerning drainage, street layouts, parks, curbs, sidewalks, utilities, including water and sewage disposal, and such improvements as top soil, streets, trees, driveways, entrance walks, finish grade, etc. Individual applications were processed by the architectural valuation and mortgage credit sections in the Chief Underwriter's

Office. During the course of the construction, FHA inspectors made periodic inspections. In fact, at Levittown a fulltime FHA inspector was employed. The court concluded that the plaintiffs would not have undertaken the developments if they had not been assured of the availability of FHA financing and, accordingly, in view of the large scale and intimate connection of FHA with the developments, the court had no difficulty in concluding that they were 'publicly assisted.'"

It is to be noted that the decision in the New York case was by a trial court whose decision is not binding precedent.

The power of the legislature to vest the appellant board with authority to order any or all owners to sell their homes to particular persons is not presented.

But on the contrary, the only question is: Can the state constitutionally compel a home owner to sell his home to one designated by a state administrative agency solely because such home owner has not paid a public loan or a loan guaranteed by a Federal or state agency while immunizing all other home owners from such coercive powers?

We affirm the judgment holding the statute unconstitutionally discriminatory under the equal protection clause of the fourteenth amendment to the Federal constitution and the privileges and immunities clause of Art. I, § 12, of the state constitution.

The reasons stated by Judge Hodson therefor are adopted as the opinion of this court.

Judge Hodson's words are:

"* * * It may very well be that, if the FHA itself had had a regulation, at the time he obtained his loan, declaring that those who took advantage of FHA benefits would thereby be prohibited from discriminating in the eventual sale of the property, such regulation would be valid and binding. He would then have had the choice of accepting FHA financing with such limitation, or obtaining private financing without FHA. In this case, the house was built long before there was any FHA, and Commander O'Meara obtained his loan two years before the effective date of the antidiscrimination law. In the circumstances, it can hardly be argued that he voluntarily assumed any limitations at the time he obtained his loan. * * *

"One further question remains: Is the classification created by the act reasonable? It applies only to 'publicly-assisted' property.

"Mr. Justice Holmes, in *Patsone vs. Pennsylvania*, 232 U. S. 138 (1914), had the following to say on the subject:

"'We start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. * * * It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. * * * The question therefore narrows itself to whether this court can say that

the (legislature) was not warranted in assuming as its premise for the law that (the class which the law singles out was) the peculiar source of the evil that it desired to prevent."

"There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract. This act would prohibit Commander O'Meara from doing what his nieghbors are at perfect liberty to do. It gives to those who have conventional mortgages, or no mortgages, and those who are buying upon contract, special privileges and immunities which are not accorded to him. The classification is arbitrary and capricious and bears no reasonable relation to the evil which is sought to be eliminated. It not only violates the equal protection clause of the 14th Amendment to the United States Constitution, but violates the special privileges and immunities clause of Article I, Section 12, of the Washington State Constitution."

The judgment appealed from is affirmed.

DONWORTH and WEAVER, JJ., concur.

MALLERY, J. (concurring)—The respondents refused to sell their home to a Negro, and, when the Washington State Board Against Discrimination (hereinafter called the board) ordered them to do so, they appealed to the superior court.

The trial court, upon the appeal, held that Laws of 1957, chapter 37, p. 107 (hereinafter referred

to as *the act*), which created the board and gave it the power to order the sale of private property to a Negro, was unconstitutional. The board, in its capacity as a party litigant, then appealed to this court the trial court's reversal of its own order, which it had issued in its role as a tribunal.

I.

The respondent's home, which was ordered sold to a Negro, is specifically protected against such an order by amendment 9 of the Washington state constitution, which provides, *inter alia*:

> "*Private* property shall not be taken for *private* use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. * * *" (Italics mine.)

The act of the legislature is invalid because it derogates from this constitutional right. The legislature attempted to evade the prohibition of the constitution by using an arbitrary classification of private homes, which it designated as *publicly-assisted housing*. This was done in recognition of the fact that the ninth amendment is not applicable to government institutions. It then proceeded to subject private homes to forced sales to private people on the assumption that it could treat private homes as public institutions if it called them by some phrase having the word *public* in it. The arbitrary classification of *publicly-assisted housing* is found in RCW 49.60.010, which provides, *inter alia*:

> " . . . A state agency is herein created with powers with respect to elimination and prevention of discrimination . . . in *publicly assisted housing* because of race, creed, color, or national origin; . . ." (Italics mine.)

That the classification *publicly-assisted housing* does not mean government financed slum clearance projects (with which the act is not concerned), government housing projects, or any other conceivable form of housing owned, operated, regulated, or controlled by the government is clearly established by the way the act itself defines the phrase *publicly-assisted housing*. RCW 49.60.040 provides, *inter alia*:

> " . . .
>
> "'Publicly-assisted housing' includes any building . . . used . . . as the home . . . of one or more persons, . . . which is financed in whole or in part by a loan, . . . the repayment of which is guaranteed or insured by the federal government . . . or the state . . . during the life of such loan . . ."

The theory of the act that F. H. A. financing converts a private home into a public institution is a palpable subterfuge to violate the clear mandate of the ninth amendment to the state constitution.

The constitutional question posed by this case is simply this: Can a *private* person, Negro or white, compel any owner to sell his *private* home to him? The act in question says that he can. The answer of the ninth amendment of the state constitution,

quoted above, is an unequivocal *no*. The personal characteristics of the home owner and would-be buyer are irrelevant to the constitutional protection of private property, which is absolute.

The act violates the ninth amendment of the state constitution and is, therefore, invalid.

II.

The tribunal's order that the respondents sell their home to a Negro involves the title and possession of real property. The act purports to confer jurisdiction upon the board and tribunal to make the adjudication embodied in the order applicable to real property.

This is violative of Art. IV, § 6, of the state constitution, which provides, *inter alia*:

> "The superior court shall have *original jurisdiction* in all cases * * * which involve the title or possession of real property. * * *"
> (Italics mine.)

A real property owner has a constitutional right to have his title and possessory right to real property adjudicated in the superior court in the *first instance*. It is apparent that the act purports to relegate the superior court to an appellate jurisdiction and to confer *original* jurisdiction upon the board-tribunal for the purpose of ordering the sale of real property to Negroes.

None of the inferior tribunals in this state can exercise *any* jurisdiction whatever over the title and possession of real property for the inescapable reason

that they have no *original jurisdiction* over real property in particular and no *appellate* jurisdiction of any kind.

The act ignores and violates the state constitution in its attempt to confer original jurisdiction upon the board and thereby relegate the superior court to an *appellate* jurisdiction. This is done specifically in RCW 49.60.270, which provides for "* * * a review of such order in the superior court * * *" It further emphasizes the appellate nature of the superior court's jurisdiction in RCW 49.60.260, which provides that, upon appeal from the tribunal's order to the superior court,

"* * *

"(2) The findings of the hearing tribunal as to the facts, if supported by substantial and competent evidence shall be conclusive. * * *"

The act is a legislative mandate to the superior courts to give credence to the factual findings of an inferior tribunal. It therefore violates Art. IV, § 6, of the state constitution for the reason that only superior courts have original jurisdiction over real property.

III.

The act violates Art. I, § 3, of the state constitution, which provides:

"No person shall be deprived of life, liberty, or property, without due process of law."

The most elementary requirement of *due process*

of law is that the adverse parties have their conflict resolved by an independent tribunal. The tribunal created by the act is neither independent nor impartial. It is an integral part of the board and serves as its right hand. RCW 49.60.250 provides that the chairman of the board (in its role as prosecutor) shall appoint the tribunal from among the "* * * members of the board or a panel of hearing examiners * * *."

Thus, the board and tribunal are composed of the same members, who function together for a common purpose. The coach of a team is never permitted to appoint as referee one of his players who happens to be on the bench at the moment. Where one party litigant appoints the tribunal, there can be no claim that the adverse party has had his day in court. The board and its self-appointed tribunal do not meet the most elementary requirements of an *independent judiciary.*

IV.

The act has created an agency with a combination of legislative, administrative, and judicial powers in violation of the constitutional separation of these powers. Its legislative powers are found in RCW 49.60.120, which provides, *inter alia*:

> "The board shall have the functions, powers and duties: * * *
>
> "(3) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out * * * the *policies* and practices *of the board* * * * * " (Italics mine.)

RCW 49.60.120 gives it the power "(4) To *receive, investigate* and *pass* upon complaints * * *" (Italics mine.) The board has exercised the authority conferred upon it by the act to both *prosecute* and *judge* over five hundred complaints filed with it. The following things were done in the instant case under the *modus operandi* authorized by the specified sections of the act:

The Negroes *complained* to the board that the respondents refused to sell their home to them (RCW 49.60.230). The board *investigated* and *made a finding* in favor of the Negroes (RCW 49.60.240). Upon respondents' refusal to accede to the board's finding, a tribunal was appointed (RCW 49.60.250). It held a hearing and *issued the order* that respondents sell their home to the Negroes (RCW 49.60.250). The respondents *appealed* the order to the superior court (RCW 49.60.270) to avoid punishment for disobeying the tribunal's order, which is a misdemeanor (RCW 49.60.310).

The superior court reversed the tribunal's order upon the ground that the act authorizing coerced sales of private homes to Negroes is unconstitutional. The board, as the adverse party in the litigation, appealed from the superior court's reversal of the identical order which it itself had issued as a tribunal (RCW 49.60.260(3)).

Thus, the board initiated the case in its role of investigator. As prosecutor, it presented its finding to itself as a tribunal in which role it adjudicated

the respondents' property rights by entering an order or judgment that they sell their home to the Negro complainants. When the superior court reversed the tribunal's judgment, it reverted to its role as prosecutor by appealing the superior court's reversal of its own order entered as a tribunal to this court. Pooh Bah of Mikado fame switched roles more tunefully, but not more often than the board does pursuant to the provisions of the act.

The act is unconstitutional because it confers a combination of powers upon the board which the state constitution requires to be separate.

The act erroneously assumes that by merely calling any agency a *tribunal*, it can then function as a court in addition to its other duties even though it lacks all the elements and characteristics which are constitutionally essential to afford due process to parties brought before it.

A casual examination of the act reveals that the committee or tribunal serves as a flying squadron to be called anywhere to bargain on behalf of any disgruntled Negro who has complained against a white man. It is called a *board* in this bargaining state of the proceeding. It designates itself as a *tribunal* in the succeeding coercive stage.

The act provides for this instantaneous transformation in the following sections: RCW 49.60.250 provides that the board render its services free of charge to Negro complainants. RCW 49.60.230 provides how a Negro files his complaint to mobilize the

board. RCW 49.60.040 provides that a Negro is discriminated against if, by purchasing any service or commodity, he was " * * * treated as not welcome, accepted, desired or solicited; * * * " RCW 49.60.240 provides the board will promptly investigate the complaint and, if true, will endeavor to secure a written agreement from the white man not to repeat the offensive act alleged in the complaint.

The board thus bargains for voluntary written surrender of the white man's private constitutional rights. This is made financially attractive to the white man because his surrender at this stage of the proceeding can be made without any cost to him. If he elects to defend his constitutional rights, he must bear his own cost in the ensuing prosecution before the *tribunal* and upon appeal. This is reputed, in the instant case, to be upwards of ten thousand dollars. RCW 49.60.250 provides for the tribunal hearing, and the issuance of a formal order by it. RCW 49.60.310 makes disobedience of the order a misdemeanor. If the outcome of the board or tribunal action is not what the Negro wanted, he may have a new hearing before the board, or he may appeal from a tribunal order to the superior court (RCW 49.60.270).

The board and tribunal would be well calculated to achieve the objectives of the act by summarily disposing of individual objections thereto were it not for the fact that a court cannot prosecute a case

before itself and a prosecutor cannot be the judge of a case he presents.

The act attempts to create such an unconstitutional combination and caps it all off with a final *coup de grace* to the right of individuals by RCW 49.60.290, which provides:

> "No court of this state shall have jurisdiction to issue any restraining order or temporary or permanent injunction preventing the board from performing any function vested in it by this chapter."

V.

The coercion of one individual by another in his private affairs is prohibited by Art. I, § 7, of the state constitution. It provides:

> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

This is a general statement of that complex of liberties encompassed in the expression "The Free World" as currently used in commentaries upon world events.

This constitutional right of the individual not to be dominated in his private affairs is predicated upon the theory that the greatest good for the greatest number can be best achieved by permitting the individual to choose his own course of action, conforming, of course, to the reciprocal rights of others.

In dealings between men, both cannot be free unless each acts *voluntarily*.

otherwise one is subjected to the other's will." *Browning v. Slenderella Systems of Seattle*, 54 Wn. (2d) 440, 455, 341 P. (2d) 859.

Until our constitution is amended, we must forego the benefits of regimentation with which other parts of the world are blest.

Thus, a white man may exercise his constitutional right to choose his own course of action in his private affairs by making a voluntary sale of his home in an exclusive district to a Negro. Neighbors cannot disturb him in his private affairs by having him enjoined from doing so. So also, if a white man refuses to sell his home to a Negro, his constitutional right not to be disturbed in his private affairs shields him from coercion on the part of the Negro.

The act, which provides for such coercion, is invalid because it is in irreconcilable conflict with the state constitution.

OTT, J., concurs with MALLERY, J.

ROSELLINI, J. (dissenting)—In approaching the question presented in this case, whether the 1957 amendment to RCW 49.60.030 is a valid exercise of the police power, the majority have not seen fit to set forth the rules which bind the court in examining such a question. These rules, so often repeated and yet apparently not always understood, were most recently set forth in *Clark v. Dwyer*, 56 Wn. (2d) 425, 353 P. (2d) 941, and are in brief:

The state constitution is not a grant, but a limitation on the law-making power, and the power of the legislature to enact all reasonable laws is unrestrained except where, *either expressly or by fair inference*, it is *prohibited* by the state and federal constitutions. Where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment, unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt. Where possible, it will be presumed that the legislature has affirmatively determined any special facts requisite to the validity of the enactment, even though no legislative finding of fact appears in the statute. The court must always bear in mind that the legislature, and not the court, is the chosen representative of the people and when it passes a law, it is the voice of the people speaking.

The police power extends not only to the preservation of the public health, safety, and morals, but also to the preservation and promotion of the public welfare. The police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution.

I think the majority have conceded that there

exists an evil with which the legislature is properly concerned and that the law in question was enacted to correct a portion of that evil. They have quoted from the opinion of the trial court a finding that the evil actually exists; so we are not limited to a presumption that the legislature found the evil to exist. We have a finding of fact that it does exist. Without such a finding, we would still be compelled to take judicial notice of the fact that discrimination in housing is one of the major social problems of our day, seriously and adversely affecting the public welfare.

Without doubt, then, the first requirement for a valid exercise of the police power has been met. Does the law in question reasonably tend to correct that evil? The majority do not deny that it does. There may be a disagreement as to whether a law requiring sellers of publicly-assisted housing not to discriminate on the basis of race, creed, or color is the most effective way to attempt to correct or alleviate the problem, or the wisest way, but I think it cannot be gainsaid that, wherever the law is enforced, it does tend in some way to correct the evil. A crack appears in the walls of the ghetto, and the educational process which, we hope, will someday eliminate the evil of discrimination, begins. The second requirement for a valid exercise of the police power has therefore been met also.

But the majority have decided that the law must fall because it violates two direct or positive consti-

tutional mandates — the fourteenth amendment to the federal constitution, which forbids states to deny equal protection of the laws to persons within their jurisdiction, and Art. I, § 12, of the state constitution, which provides:

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

These provisions do not prohibit class legislation. They do require that such legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class. Within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust. *Clark v. Dwyer*, *supra*; *Faxe v. Grandview*, 48 Wn. (2d) 342, 294 P. (2d) 402; *Bauer v. State*, 7 Wn. (2d) 476, 110 P. (2d) 154. These cases also point out that it is universally held that courts will not look too nicely into legislative acts to determine whether a reasonable distinction exists.

These are rules which were overlooked by the trial court in its memorandum opinion and have consequently been overlooked by the majority in adopting that opinion as their own. Significantly, moreover, they have overlooked the corollary prin-

ciple that the legislature, when it chooses to act to correct a given evil, need not correct all of the evil at once, but may proceed step by step. The power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. Numerous cases of the United States supreme court and state courts so holding are cited in 12 Am. Jur. 163, *Constitutional Law* § 485, n. 17. Among them is *Laughney v. Maybury*, 145 Wash. 146, 259 Pac. 17, 54 A. L. R. 393.

Was there in this case no reasonable ground of distinction between sellers of publicly-assisted housing and sellers who have not received such aid? I think it should be manifest that while the practice of discrimination on the basis of race, creed, or color in the sale of any housing is objectionable and harmful to the community, in the case of a sale by one to whom the public (including those discriminated against) has lent its aid in acquiring his ownership, it is particularly odious. Inasmuch as the state itself is not permitted, under the fourteenth amendment, to give any support to discriminatory acts, it seems only logical to me that the legislature, recognizing the great public concern in this matter, should determine that it would not lend its aid indirectly by permitting discrimination by those who offer their publicly-assisted housing for sale.

It is significant that, with the exception of Colorado, all states which have enacted laws prohibiting

discrimination in housing (California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Washington) limited the coverage of the initial enactment to public or publicly-assisted housing. In two of these states, New York and New Jersey, these laws have been upheld against the charge of unreasonable classification. In the New York case, *New York State Comm. Against Discrimination v. Pelham Hall Apartments, Inc.*, 10 Misc. (2d) 334, 170 N. Y. S. (2d) 750, the opinion states that

> * * * the test is whether or not the classification rests upon some reasonable basis bearing in mind the subject matter and the object of the legislation."

After noting that civil rights and anti-discrimination legislation both in New York and on the federal level have been "a step by step" proposition, the court continued:

> * * * A proceeding step by step by legislative bodies to eliminate the practice of racial discrimination in affairs closely connected with the lives of our citizens is not only a reasonable, but in view of changing times and circumstances, a required method of procedure in the interest of public welfare. The Legislature was authorized to proceed as it did in imposing a ban against discrimination in housing, that is, by gradual steps, beginning with provisions applicable to various classes of publicly owned and managed housing and over a period of time extending the provisions to speci-

fied classes of private housing projects inaugurated or carried out with governmental assistance. Proceeding in such manner required classification in the legislation enacted from time to time; and, under the circumstances, reasonable classification was justified. * * *"

In other words, is the legislature acting unreasonably when, in adopting reforms in this emotion-wrapped field involving race relations, it elects to proceed slowly?

In the New Jersey case, *Levitt & Sons, Inc. v. Division Against Discrimination, etc.*, 31 N. J. 514, 158 A. (2d) 177 (appeal dismissed for want of a substantial federal question, 363 U. S. 418, 4 L. Ed. (2d) 1515, 80 S. Ct. 1257), the state supreme court dealt at length with the argument that the New Jersey law against discrimination, by including within its purview only publicly-assisted housing, created an unreasonable and arbitrary classification in violation of the federal and state constitutions. Quoting *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 83 L. Ed. 1001, 59 S. Ct. 744, the unanimous opinion stated that there is a presumption in favor of the constitutionality of a statute and that it will be upheld unless facts judicially known or proved refute that presumption. The opinion then stated that classification will be sustained unless it causes "invidious discrimination," and next quoted the following passage from a previous decision of the same court (*New Jersey Restaurant Ass'n v. Holderman*, 24 N. J. 295, 131 A. (2d) 773):

"* * * It is easily stated that the classification (1) must not be palpably arbitrary or capricious, and (2) must have a rational basis in relation to the specific objective of the legislation. But the second proposition is qualified by limitations which compound the difficulties of one who assails the legislative decision. Thus it is not enough to demonstrate that the legislative objective might be more fully achieved by another, more expansive classification, for the Legislature may recognize degrees of harm and hit the evil where it is most felt. [citing cases] The Legislature may thus limit its action upon a decision to proceed cautiously, step by step, or because of practical exigencies, including administrative convenience and expense, * * * or because of practical exigencies, including of public policy or convenience or the service of the general welfare." * * * Hence it may "stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact." * * *"

Applying these rules to the case at bar the opinion rejected the "unreasonable classification" argument. It said:

"Considering the circumstances which led to the enactment of the statute in question, it becomes apparent that the classification presents no constitutional difficulties. We may note the pressing need for adequate housing for minority groups. Many more in these groups than at present would be in a position to take

an active and beneficial role in the cultural, social and economic life of the community were they given an opportunity, and a vital factor in affording this opportunity is access to normal housing accommodations. The portion of the statute in question which relates to housing may be viewed as a means chosen to ease the housing problem facing minority groups. It may be argued that the main purpose is to secure some measure of adequate housing for minorities and only incidentally to this purpose is discrimination proscribed. The desired end may be achieved by legislating in regard only to a specific kind of housing. And the type of housing chosen is that most easily financed and as to which established patterns would least likely be disturbed. If these goals are not the intent of the Legislature, they do at least serve to demonstrate, insofar as they give a reasonable basis for the statutory classification, that the statute is not invalid on its face or palpably arbitrary. *Cf. Sage Stores Co. v. State of Kansas*, 323 *U. S.* 32, 35, 65 *S. Ct.* 9, 89 *L. Ed.* 25 (1944); *Jamouneau v. Harner*, 16 *N. J.* 500, 519-520 (1954), *certiorari* denied 349 *U. S.* 904, 75 *S. Ct.* 580, 99 *L. Ed.* 1241 (1955). *Reingold v. Harper*, 6 *N. J.* 182, 194 (1951). In the absence of a showing of an actual injury to the plaintiffs, which was not attempted in the proofs, we cannot declare the legislation unconstitutional. Thus, the means chosen by the Legislature to accomplish its goals are not unreasonable, and on that basis we hold that plaintiffs' argument that the Law Against Discrimination

incorporates an unconstitutional classification is without merit."

The trial court in the case before this court attempted to distinguish these cases by pointing out that in the New York case, multiple-unit apartment houses were involved, whereas O'Meara was merely selling a private dwelling. No attempt was made to distinguish the New Jersey case which dealt with discrimination in the sale of one-family dwelling units.

I am at a loss to understand, and the majority do not explain, the theory under which they attach significance to the fact that the financing had already been secured when the 1957 law was passed. They say that O'Meara did not voluntarily subject himself to its restraints when he secured his housing. The same would be true of any person who had acquired his property, or entered into a contract for its purchase prior to the effective date of the act if it applied to all housing and not just publicly-financed housing; yet the majority apparently concede that such a law would be valid. The same facts existed in the New Jersey case, but no one saw fit to attach any significance to them. I do not see that they are at all relevant. There is no contention that this is an *ex post facto* law, or retroactive in effect.

Without criticizing the New Jersey case in any way, the majority dismiss it as "not binding precedent," although they have no hesitation in adopting, without analysis or discussion, the trial court's opin-

ion rendered in this case. That "binding precedent" was criticized at some length in an article which appears in the New York Law Forum, Vol. 6, 1960, p. 38, written by Arnold Forster and Sol Rabkin. I readily recognize that this is not binding precedent either; nevertheless, the author's analysis of the classification problem in this case is so succinct that I will take the liberty of quoting from it. After setting forth the rules which I have referred to above, regarding the heavy burden resting on one assailing a classification, to show that it is arbitrary and without reasonable basis, they say:

> * * * It would appear that the legislature's decision to impose a duty of non-discrimination on those selling housing which they obtained with the aid of the public credit has several very reasonable grounds. It is hardly arbitrary for the legislature in selecting the housing to which it will first apply a ban on discrimination, to impose that requirement of higher community conduct on those receiving public aid. Is not the strengthening of the guarantee of equal treatment implicit in our basic democratic institutions a proper requirement to impose on housing obtained by the use of the public credit? Another reasonable basis for the legislature's selection of publicly assisted housing as the first class to be subjected to a ban on discrimination is that such a ban can be more easily enforced than a ban on other types of housing since the very involvement of a public agency in such transfers makes enforcement of the ban easier in such transactions. Further-

more, the sanction of possible delay or suspension of the public mortgage insurance is available as a potential additional enforcing device.

"It is clear that there are not one, but several, completely reasonable bases for the legislative classification involved in statutes barring discrimination in publicly assisted housing and that, therefore, any effort to strike down such statutes as improper legislative classifications is improper."

The trial court seems to have been disturbed by the nature of this legislation, which imposes a limitation on an owner of real property who decides to sell it. The court makes frequent reference to the concept of "freedom of contract." But that property rights are held and must be used subject to reasonable regulations under the police power is so well established that citations of authority are unnecessary. The trial court and the majority have implicitly recognized that it is not enough to show that an incident of property ownership has been restricted in order to successfully challenge the constitutionality of an act.

The freedoms protected by positive mandate of the constitution are those contained in the first amendment to the federal constitution, and Art. I, §§ 4, 5, and 11 of the state constitution. These are the freedom of religion, speech, press, and assembly. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10, this court exercised the most extreme judicial restraint in upholding a law attacked as an inter-

ference with two of those freedoms, searching diligently through all manner of evidence (reliable and not so reliable) to find some facts which would justify its enactment. Now, confronted with an act which does not abridge any of these expressly-protected freedoms, but merely imposes a limitation on the disposition of one's property, which is clearly reasonable and unoppressive, the majority eagerly and peremptorily strike it down. To my mind, the respondent has failed to sustain the burden of demonstrating the invalidity of the act; and the decision of the majority is an arbitrary interference with the will of the people expressed unequivocably through legislation.

I would reverse.

FINLEY, C. J., HILL, and HUNTER, JJ., concur with ROSELLINI, J.

HILL, J. (dissenting) — I have signed Judge Rosellini's dissent, but feel impelled to encumber the record with a brief expression of my own views.

The trial court's memorandum opinion, quoted and approved by the majority, states clearly the harmful effects of segregated housing. Segregated housing, of course, is due to a multiplicity of causes; however, the discrimination, which prevents those who have the desire and the means to acquire housing outside the segregated area, is an important contributing factor to its spread and its perpetuation. A great public need exists to end this discrimination.

I am convinced that the police power, the least

limitable of the powers of government, already so extensively used to subordinate the rights of property ownership and of contract where they conflict with the public interest, can be properly exercised to meet that need. I do not think its exercise requires the crutch of publicly-assisted housing. The prohibition should be directed against discrimination, and not against discrimination by some particular group based on their method of financing.

By signing Judge Rosellini's dissent, I have indicated that I agree that the particular classification used by the legislature can be justified, but that does not mean that its wisdom is not open to serious question.

Zoning ordinances; height of buildings; method of construction; character of materials, etc.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

In The Matter of The Appeal of JOHN J. O'MEARA and DONNA A. O'MEARA, his wife,
Petitioners,
v.
WASHINGTON STATE BOARD AGAINST DISCRIMINATION,
Respondent,
and
ROBERT L. JONES, *Complainant,*
and
RAYMOND D. TORBENSON, ROBERT M. THATCHER, and SEATTLE REAL ESTATE BOARD,
Additional Defendants.

No. 535996

MEMORANDUM OPINION

Messrs. George J. Toulouse and *Richard M. Thatcher*, Attorneys for Petitioners and Additional Defendants;

Mr. Robert W. Winsor, Attorney for Complainant;

Messrs. Philip V. Meade, Elihu Hurwitz, and *Wing Luke*, Assistant Attorneys General, Attorneys for Respondent.

The petitioner John J. O'Meara is a Commander in the United States Coast Guard. He and his wife own a single-family residence at 3004 East 70th Street, Seattle, Washington. In the early spring of this year, Commander O'Meara received orders transferring him to Washington, D. C. He placed his Seattle home on the market by running an adver-

tisement in the Seattle Times and by posting "For Sale" signs on his front lawn and at other places in the neighborhood. He did not list it for sale with any real estate broker as he intended to deal directly with prospective purchasers.

The complainant, Robert L. Jones, is a Negro, employed by the United States Postal Service. On Sunday, April 19th, Mr. and Mrs. Jones and some friends visited and inspected the O'Meara home. On Tuesday, April 21st, complainant's attorney went to the O'Meara home and left with Mrs. O'Meara a signed earnest money receipt contemplating a sale for $18,000, "all cash to seller on closing." The earnest money receipt was accompanied by a check for $1,000 as a down payment. These documents were left with Mrs. O'Meara over her protest. On April 22, they were returned to complainant's attorney by Commander O'Meara.

Mr. Jones lodged a complaint with the Washington State Board Against Discrimination, which followed the statutory administrative procedure by convening a hearing tribunal, which sat on Saturday, April 25th. The hearing consumed approximately eleven hours and the transcript of the testimony runs to 300 pages. Seven witnesses were heard. Thereafter, the hearing tribunal filed its opinion, findings of fact, and order. The hearing tribunal found, as a fact, that the O'Mearas had refused to sell their home to complainant because of his color, and that such refusal constituted an unfair practice as defined in RCW 49.60.217.

The home in question is approximately 24 years old. The O'Mearas bought it in 1955. It was financed through a private loan insured by the Federal Housing Administration, which hereafter in this opinion will be referred to as FHA. The law against discrimination under the authority of which the hearing tribunal sat, insofar as it applies to housing, was not enacted until 1957.

For the purposes of this opinion, it will be assumed that the hearing tribunal was correct in finding that the O'Mearas had refused to sell their home to complainant because of his color. The law with which we are concerned, so far as applicable here, reads as follows:

> "Be it enacted by the Legislature of the State of Washington:
>
> "Section 1. Section 1, chapter 183, Laws of 1949 and RCW 49.60.010 are each amended to read as follows:
>
> "This chapter shall be known as the 'law against discrimination.' It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein

created with powers with respect to elimination and prevention of discrimination in employment, in places of public resort, accommodation or amusement, and in publicly-assisted housing because of race, creed, color, or national origin; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

* * *

"Section 3. Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

"The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

* * *

"(3) The right to secure publicly-assisted housing without discrimination.

* * *

" 'Publicly-assisted housing' includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly-assisted only during the life of

such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof;

* * *

"Section 15. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to reads as follows:

"It shall be an unfair practice:

"(1) For the owner of publicly-assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons;"

This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with sub-standard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to instability in family life, moral laxity, and delinquency. It can and must be eliminated, not only

in order that the members of our minority groups may reach their full potential but also in order that the majority may be brought to act in a manner consistent with the principles which they profess. It may be noted also that elimination of discrimination is necessary for the sake of America's relations with the rest of the world. Our standing with the so-called uncommitted peoples of the world suffers seriously because of the continued discrimination and segregation practiced in America.

In preparation for the hearing of this case, in addition to the legal authorities which have been cited by counsel and found by the court in independent research, the court has had the benefit of the following sociological material:

Report No. 37
Psychiatric Aspects of School Desegregation
Group for the Advancement of Psychiatry;

Where Shall We Live?
Report of the Commission on Race and Housing
University of California Press;

American Jewish Congress
Committee on Law and Social Action
The Sharkey-Brown Isaacs Bill;

The Negro Potential, Ginsberg;

An American Dilemma, Gunnar Myrdal;

To Preserve These Rights
A Report of the President's Committee on Civil Rights;

The so-called Banner Report
A survey of community patterns conducted by

the National Urban League for the Board of Directors of the Seattle Urban League;

The Testimony of James H. Scheuer from the Congressional Record of July 30, 1957;

Statements on the subject issued by various religious denominations as printed in Interracial News Service for January, February, March, and April, 1959;

A Statement of Principles and Objectives promulgated by the Administrative Board of the National Catholic Welfare Conference on November 14, 1958;

Prejudice and Your Child, Clark;

Racial and Cultural Minorities, Simpson-Yinger.

The court is in agreement not only with the testimony adduced in this case, but with most of the foregoing listed material. However, sociology is not law.

We are faced here with a head-on collision between two rights, both of which historically have been regarded as basic, natural, inherent, and inalienable. One is the right of every individual to be treated equally, regardless of such irrelevant factors as race, creed, and color. The other is the right of the owner of private property to complete freedom of choice in selecting those with whom he will deal. This freedom of choice, as a legal conception, has been formalized as the principal of freedom of contract. It is a classic instance of the irresistible force meeting the immovable object. The danger is that, in our zeal to protect and enforce the right to equality, we may

seriously invade and curtail the right to freedom of contract.

Only three similar or analogous cases have been found. Two terminated at the trial court level and one was decided last week by an intermediate appellate court. Research has revealed no case decided by the court of last resort of any state.

New York State Commission Against Discrimination vs. Pelham Hall Apartments, Inc., et al., is Index No. 8642/1957 in the Supreme Court of the State of New York for Westchester County. The Commission Against Discrimination had ordered the respondents not to discriminate in the leasing of apartments in alleged publicly-assisted housing. The respondents were the owners of a multiple-apartment dwelling. They refused to lease an apartment to one Shervington, a Negro. They admitted that their refusal was because of his race. The FHA commitment had been made on June 30, 1955, and the effective date of the New York statute was the following day, July 1st. It is to be noted that the New York statute is prospective only. It does not, as the Washington statute purports to do, apply to housing which was publicly assisted before its effective date. The bank advances which were made on account of the insured loan during construction of the project all came subsequent to the effective date of the act. It is to be noted also that the New York statute applies only to multiple dwellings or housing projects of ten or more contiguous houses. In the circumstances, the court had

no difficulty in finding the respondents' property to be publicly assisted. On the constitutional question, the court recognized that the legislation could be justified only if it was determined that it was a valid exercise of the police power. It was held that the act was a valid exercise of the police power, and that its limitation to the specified classes of housing and to housing which became publicly assisted after July 1st, 1955, was a reasonable classification or at least was not so arbitrary and unreasonable as to be in violation of the equal-protection clauses. Accordingly, the application of the Commission to enforce its order against the respondents was granted.

Ming v. Horgan, et al., is No. 97130 in the Superior Court of the State of California for Sacramento County. That case was not brought under the provisions of a state antidiscrimination law to compel the sale of property. It was a civil suit by a Negro for damages for refusal to sell him property, to-wit: a "tract home" in one after another of FHA and GI-insured subdivisions in the Sacramento area. There were fourteen named defendants and ten Doe defendants. The defendants were real estate sales agents and builder-subdividers. The homes had been constructed after FHA and GI commitments had been obtained. Since nine other members of the plaintiff's race had had similar experiences, plaintiff's was not an isolated experience or the result of mistake or personal antipathy. There thus appeared a pattern of conduct on the part of the builder-sub-

dividers and real estate agents which revealed a settled policy, at least tacitly understood, that sales in new housing developments or subdivisions would not be made to Negroes. Upon these facts, plaintiff relied on a conspiracy theory. The court noted that the subdividers and builders, as well as the real estate brokers and salesmen, were all required to have state licenses to engage in their respective activities. The court stated that there is no legal restriction whatever (absent a statute) against an individual discriminating on the basis of color, race, creed, or any other characteristic in exercise of his freedom to contract. Whatever legal restriction exists is a restriction on government. It recognized that the case involved no appropriation of money and no subsidy, and that the powers of government were exercised merely by way of mortgage insurance guaranty, inspection services, and other administrative accompaniments. The court concluded that no conspiracy had been established, and that the defendants had acted in the honest belief that to sell to a Negro would be the introduction into a white neighborhood of an inharmonious element not consistent with the obligation the defendants had to others to whom they had sold or hoped to sell and would be detrimental to the property values in the subdivision. It was concluded that the plaintiff had established a violation of his rights and he was allowed nominal damages.

Leavitt & Sons, Inc., vs. Division Against Discrimination is No. A-334-58 in the Appellate

Division of the Superior Court of New Jersey, decided July 22, 1959. In that case, the plaintiff appellant was the developer of approximately 16,000 one-family houses in a project known as Levittown. Its coplaintiff, Greenfield's Farm, Inc., was the developer of approximately 600 houses in Greenfield's Village. The FHA had committed itself to insure mortgages made by purchasers. It was necessary for FHA to approve the site and to lay down requirements concerning drainage, street layouts, parks, curbs, sidewalks, utilities, including water and sewage disposal, and such improvements as top soil, streets, trees, driveways, entrance walks, finish grade, etc. Individual applications were processed by the architectural valuation and mortgage credit sections in the Chief Underwriter's Office. During the course of the construction, FHA inspectors made periodic inspections. In fact, at Levittown a full-time FHA inspector was employed. The court concluded that the plaintiffs would not have undertaken the developments if they had not been assured of the availability of FHA financing and, accordingly, in view of the large scale and intimate connection of FHA with the developments, the court had no difficulty in concluding that they were "publicly assisted."

Prior to the *Pelham* case, *supra*, and prior to the effective date of the New York antidiscrimination law, the New York Court of Appeals decided the case of *Dorsey vs. Stuyvesant Town Corporation*,

(1949) 299 N. Y. 512, 87 N. E. (2d) 541. In that case, the respondent was a redevelopment company which had refused to lease an apartment to a Negro, who thereupon sought an injunction. The respondent had acquired its land and a tax subsidy through agencies of New York City, as well as the state, but the housing was erected with private funds. The court there held that the public assistance which the respondent had received was not sufficient to bring it within the constitutional inhibitions. The court, in effect, invited the legislature to fill the gap and the legislature subsequently did.

The state here, in order to prevail, must demonstrate that the complainant Jones lies within the ambit of the equal-protection clause of the 14th Amendment to the United States Constitution, which is "an explicit safeguard of prohibited unfairness." *Bolling vs. Sharpe*, 347 U. S. 497 (1954). However, the 14th Amendment proscribes only *state* action. Individual invasion of individual rights is not the subject matter of the 14th Amendment, *Civil Rights Cases*, 109 U. S. 3 (1883). However, in recent years the courts have greatly broadened the concept of state action, and have found a variety of activities to be such. In order to reach that conclusion, the courts have to find that the individuals concerned have conducted themselves by, for, or as the state. In order to be constitutional, the act in question must satisfy the notion of "state action". Insofar as the landowner is acting by, for, or as the state,

the 14th Amendment is applicable, and insofar as he is acting in his private capacity, it does not apply.

In *Shelley v. Kraemer*, 334 U. S. 1 (1948), the court held that restrictive covenants in deeds were not enforcible, that is, the aid of the state could not be invoked through the courts to enforce such covenants. However, the court recognized that voluntary enforcement or observance of such covenants did not violate a constitutional right. Here again the distinction between the state action and private action was recognized. The *Dorsey* case, *supra*, was decided one year later.

An act of the state legislature is entitled to a presumption of constitutionality. The burden is on the challenger to establish that the statute exceeds the power of the legislature and, unless there is a clear conflict with the constitution, the act must be upheld. *Gruen vs. State Tax Commission*, 35 Wn. (2d) 1, 211 P. (2d) 651 (1949); *Port of Tacoma v. Parosa*, 52 Wn. (2d) 181, 324 P. (2d) 438 (1958). The court cannot substitute its own judgment for that of the legislature as to the wisdom, expediency, or propriety of legislation. The legislative and judicial branches of the government are independent and coordinate. The court cannot set itself up as a super legislature. In the exercise of the police power, the legislature may enact any law to protect the health, safety, morals, and welfare of the people. Necessarily, the police power is an elastic concept. Its reach must become longer as our society becomes more complicated. The only limitation is that the

end which is sought to be attained shall be accomplished by methods consistent with due process. This simply means that the law must not be unreasonable, arbitrary, or capricious, and that the means selected to accomplish the desired result shall have a real and substantial relation to the object sought to be attained. *Nebbia vs. New York*, 291 U. S. 502 (1934); *United States vs. Carolene Products Co.*, 304 U. S. 144 (1938). Statutes are not to be declared unconstitutional merely because they may tend to cut down the property rights of certain private property owners and may result in some financial loss to them without provision for compensation therefor. *Block v. Hirsch*, 256 U. S. 135; 16 C. J. S. 1054-1058. However, it must not be forgotten that the right of private property is a fundamental, natural, and inalienable right guaranteed by the Federal and state constitutions. 16 C. J. S. 1048, et seq. One of the purposes for which our government was founded was to protect individuals in the enjoyment of private property, and one of the incidents of ownership has always been the right freely to choose those with whom the owner will deal.

It may be that the *Pelham*, *Horgan*, and *Levitt* cases were correctly decided. A plausible argument can be made to the effect that one who obtains an FHA commitment prior to construction of a mass housing development and thereafter avails himself of all of the FHA's administrative machinery, including approval of the plans and inspection during construction, thereby becomes so intimately identi-

fied with government as to become affected with a public interest. It can be argued that such people become, to coin a phrase, persons of public accommodation. Land developers, builders of subdivisions, and real estate agents hold themselves out to the public as being prepared to provide wholesale housing for the masses, but the individual owner of a single private home presents an entirely different problem. Accordingly, the New York, California, and New Jersey cases are not here persuasive. Those cases all involve houses which had not become anyone's home at the time of FHA commitment. In fact, they had not even been constructed, and it can well be argued that, as a matter of social policy, thoroughly integrated housing should first be brought about in such new developments because there it can be accomplished at the outset without disturbing established patterns.

In addition to the authorities cited elsewhere in this opinion, the court has read the following:

Pound, "Liberty of Contract," 18 Yale Law Journal 454;

Jacobson, "Federalism and Property Rights," 15 New York University Law Quarterly 319;

Witherwax, "Antidiscrimination Legislation As It Affects Real Property Rights," 23 Albany Law Review 75;

McNeill, "Is There a Civil Right to Housing Accommodations?" 33 Notre Dame Lawyer 463;

Fisher and Greenberg, "The New Jersey Housing Anti-Bias Law: Applicability to Non-State-Aided Developments," 12 Rutgers Law Review 557;

Walch, Note on Recent Legislation, 56 Michigan Law Review 1223;

P. G. A. and M. C. G., "Racial Discrimination in Housing," 107 Pennsylvania Law Review 515.

This court concludes that it is palpable sophistry to argue that Commander O'Meara, in endeavoring to sell his home, is acting by, for, or as the state. A private individual acting in his private capacity is perfectly free to discriminate as he pleases. The alchemy by which his conduct may be transmuted into state action is too subtle for this court to understand. The mere existence of an FHA insured mortgage on his house is far too tenuous a thread upon which to hang such a drastic invasion of his constitutional right to do as he pleases with his own property. The thumb of government rests too lightly upon the scales. It may very well be that, if the FHA itself had had a regulation, at the time he obtained his loan, declaring that those who took advantage of FHA benefits would thereby be prohibited from discriminating in the eventual sale of the property, such regulation would be valid and binding. He would then have had the choice of accepting FHA financing on such terms, or obtaining private financing without FHA. If his home was built [illegible] FHA, and

mander O'Meara obtained his loan two years before the effective date of the antidiscrimination law. In the circumstances, it can hardly be argued that he voluntarily assumed any limitations at the time he obtained his loan. The court concludes, therefore, that, as applied to Commander O'Meara and others similarly situated, the act is unconstitutional and void as in violation of the 14th Amendment to the United States Constitution.

One further question remains: Is the classification created by the act reasonable? It applies only to "publicly-assisted" property.

Mr. Justice Holmes, in *Patsone vs. Pennsylvania*, 232 U. S. 138 (1914), had the following to say on the subject:

> "We start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out . . . It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. . . . The question therefore narrows itself to whether this court can say that the (legislature) was not warranted in assuming as its premise for the law that (the class which the law singles out was) the peculiar source of the evil that it desired to prevent."

There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract. This act would prohibit Commander O'Meara from doing what his neighbors are at perfect liberty to do. It gives to those who have conventional mortgages, or no mortgages, and those who are buying upon contract, special privileges and immunities which are not accorded to him. The classification is arbitrary and capricious and bears no reasonable relation to the evil which is sought to be eliminated. It not only violates the equal-protection clause of the 14th Amendment to the United States Constitution, but violates the special privileges and immunities clause of Article I, Section 12, of the Washington State Constitution.

To uphold the act here in question by extending the state-action theory to the present set of facts would so seriously strain the already severely-tested concept of private property as to leave little of it standing. This court does not believe that we have yet reached that stage in our social evolution which would permit any such holding.

Accordingly, the order of the hearing tribunal of the State Board Against Discrimination is held to be null and void, and is hereby set aside. An appropriate order may be presented.

DATED at Seattle, this 31st day of July, 1959.

JAMES W. HODSON, Judge.

Appendix C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN J. O'MEARA *et al.*,
Respondents,

v.

THE WASHINGTON STATE BOARD AGAINST DISCRIMINATION,
Appellant,

RAYMOND D. TORBENSON *et al.*,
Defendant.

ROBERT L. JONES, *Intervenor.*

No. 35436

ORDER DENYING PETITIONS FOR REHEARING

The court having considered the petition of the appellant and the petition of the intervenor, Robert L. Jones, for a rehearing herein, and a majority of the Judges being of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing be and they are hereby denied.

Dated this 21st day of November, 1961.

By the Court:

ROBERT C. FINLEY, *Chief Justice.*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN J. O'MEARA *et al.*,
Respondents,

vs.

THE WASHINGTON STATE BOARD AGAINST DISCRIMINATION,
Appellant,

RAYMOND D. TORBENSON *et al.*,
Defendants,

ROBERT L. JONES, *Intervenor.*

Remittitur
No. 35436
King County
No. 535996

This is to certify that the opinion of the Supreme Court of the State of Washington filed on September 29, 1961, became the final judgment of this court in the above entitled case on November 21, 1961. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

The petitions for rehearing were denied by order dated November 21, 1961.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Since a cost bill has not been filed within the time allowed, any claim to costs has been waived and no costs are taxed.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 22nd day of November, A.D. 1961.

WILLIAM M. LOWRY,
Clerk of the Supreme Court of the State of Washington.